Supreme Court, U.S.
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No. 991229

In The
Supreme Court of the United States

THOMAS J. RATCLIFF,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR WRIT OF CERTIORARI
with Appendix

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QUESTIONS PRESENTED FOR REVIEW

Should this Court overrule its decision in *Feres v. United States*, 340 U.S. 135 (1950), which held that injuries sustained by a service person as the result of the negligence of an employee of the government are not compensable under the Federal Tort Claims Act, 28 U.S.C. §§2671-2680, if those injuries are deemed to have been sustained "incident to service?"

Assuming that there is an exception under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680, for injuries that are sustained "incident to service," what are the relevant factors in determining whether the exception applies?

Assuming that there is an exception under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680, for injuries that are sustained "incident to service," does it apply to a claim by a service person that he or she was injured as a result of medical negligence in the treatment of a non-service related illness or condition?

Assuming that there is an exception under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680, for injuries sustained by members of the armed services that are sustained "incident to service," should the applicability of that exception be limited to claims by service persons for injuries that were sustained in the course and scope of their employment?

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OPINIONS BELOW

The United States District Court for the Southern District of Ohio filed its OPINION AND ORDER on May 29, 1998 (Appendix E), and entered its JUDGMENT IN A CIVIL CASE on the same day (Appendix D).

The United States Court of Appeals for the Sixth Circuit affirmed the judgment rendered in the District Court in an opinion filed on July 22, 1999, and indicated that its opinion was "not recommended for full-text publication." (Appendix A). The Petitioner, on September 3, 1999, filed a Petition for Rehearing en banc, which was denied in an ORDER filed on October 26, 1999. (Appendix B).

JURISDICTION

The Court of Appeals rendered its opinion affirming the decision of the District Court on July 22, 1999, and the Petitioner filed, on September 3, 1999, a Petition for Rehearing en banc, which was denied in an ORDER filed on October 26, 1999. (Appendix B) The instant Petition for a Writ of Certiorari is being filed within ninety (90) days of the denial of the Petition for Rehearing en banc. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. §1254(A). (Appendix G.)[1]

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[1] It should be noted that Rules 35 and 41 of the Federal Rules of Appellate Procedure and the Rules of this Court were recently amended to make clear that, when a rehearing en banc is sought, the time for seeking review in this Court is tolled:

Pursuant to Rule 29.4(a), service is made, in addition to counsel of record for the Respondent in the Court of Appeals below, on the following:

Solicitor General of the United States
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> One of the purposes of the substantive amendments is to treat a request for rehearing en banc like a petition for panel rehearing so that a request for a rehearing en banc will suspend the finality of the court of appeals' judgment and delay the running of the period for filing a petition for writ of certiorari. Companion amendments are made to Rule 41.

Fed.R.App.Proc. 35, Advisory Committee Notes, 1998 Amendments. Similarly, Rule 13 of this Court, as adopted January 11, 1999 (effective May 3, 1999), omits the following language which was set forth in the prior version of the Rule: "A suggestion . . . for a rehearing in banc pursuant to Rule 35(b), Federal Rules of Appellate Procedure, is not a petition for rehearing within the meaning of this Rule."

STATUTES INVOLVED IN THE CASE

The statutes involved in this case are: 28 U.S.C. § 1346(b); 28 U.S.C. § 2671; 28 U.S.C. § 2674; and; 28 U.S.C. § 2680. The pertinent language of these statutes is set forth verbatim in the appendix. (Appendix G).

STATEMENT OF THE CASE

This case involves the claim of the Petitioner Thomas J. Ratcliff, a service person, against the Respondent United States of America, for compensatory damages he allegedly sustained as a result of medical negligence committed by employees of the Respondent in the treatment of kidney stones, directly and proximately resulting in permanent injuries. The Respondent United States of America filed, on March 10, 1998, a "Motion to Dismiss," asserting that the District Court lacked subject matter jurisdiction "because plaintiff's claims of alleged medical malpractice are incident to his military service and are thus barred pursuant to *Feres v. United States*, 340 U.S. 135 (1950)." The District agreed, and granted the Motion to Dismiss. (Appendix E)

Although the District Court, based upon its conclusion that the Petitioner's claim was not compensable under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 [hereinafter "FTCA"], held that it did not have subject matter jurisdiction over the Petitioner's claim, it is the Petitioner's position that his claim is compensable under the FTCA, such that the District Court did have jurisdiction, pursuant to 28 U.S.C. § 1346(b). (Appendix

G) The Sixth Circuit Court of Appeals had jurisdiction to review the final judgment of the District Court pursuant to 28 U.S.C. § 1291. (Appendix G).

Because this case was decided pursuant to a motion to dismiss, the lower courts were required to, and did, accept as true the allegations set forth in the Complaint, which asserts that the Petitioner Ratcliff, who was on active duty as a first lieutenant in the United States Army, was admitted to Lyster Army Hospital, in Alabama, from May 4, 1995 to May 10, 1995, and to the Kessler Medical Center, in Mississippi, from May 10, 1995 to June 11, 1995, for treatment of a non-service related condition, i.e., kidney stones, and that, as a result of negligent medical treatment rendered by employees of the Respondent United States of America [hereinafter referred to as "Respondent U.S."], he sustained permanent injuries. The Complaint also alleges that the Petitioner Ratcliff's injury was not sustained "incident to service." (Appendix F).

ARGUMENT

A. Reasons Why This Court Should Allow The Writ

This Court should allow the writ sought herein for either of the following two alternative reasons: (1) to overrule its prior holding, in *Feres v. U.S.*, 340 U.S. 135 (1950), to the effect that claims by service persons for injuries sustained "incident to service" are not compensable under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680, or; (2) in the event that this Court determines that *Feres* was correctly decided, to resolve conflict among the United States Circuit Courts of Appeals regarding when an

injury is sustained "incident to service," which conflict flows from the fact that this Court's jurisprudence in this area is confusing and contradictory, and to hold that this exception applies only to injuries sustained by members of the armed services in the course and scope of their military employment.

B. The Holding Of This Court In *Feres v. United States*, 340 U.S. 135 (1950), Should Be Overruled

The Respondent United States argued in the Courts below that the mere fact that Petitioner Ratcliff was an active duty serviceman at the time that he received the negligent medical care established that his injury was sustained "incident to service," such that the District Court below lacked jurisdiction, and the District Court, pursuant to "binding Sixth Circuit precedent," agreed, although it characterized that result as "harsh":

> Plaintiff's injuries are the result of treatment he received in Defendant's military hospital. Although…the reason he was in the hospital was not related to military activity, it is nonetheless deemed as a matter of law to be incident to service under the *Feres* doctrine because he was on active duty status. The result may seem harsh, but under binding Sixth Circuit precedent, defendant is entitled to dismissal of plaintiff's claims as a matter of law.

Appendix E. The Sixth Circuit agreed with the District Court, including the characterization of this result as

"harsh":

> As stated by the district court, "[t]he result may seem harsh, but under binding Sixth Circuit precedent, defendant is entitled to dismissal of plaintiff's claims as a matter of law."

Appendix A. As will be shown below, however, the Federal Tort Claims Act ["FTCA"] contains no "incident to service" exception to the liability it created on the part of the United States, such that this Court's decision in *Feres* should be overruled, and the Respondent's motion to dismiss should have been denied.

28 U.S.C. §1346(b) provides that federal district courts shall have exclusive jurisdiction of civil actions against the United States, for damages for injury or death caused by the negligence of any employee of the Government under circumstances where the United States, if a private person, would be liable to the claimant pursuant to the law of the place where the negligence occurred. [2] Importantly, this statutory language does *not* except claims

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[2] In the instant case, the negligence occurred in Alabama and Mississippi, and the law of both of these states recognizes claims for medical negligence. See *Complete Family Care v. Sprinkle*, 638 So.2d 774 (Ala. 1994) (physician had duty to exercise ordinary care in treatment of patient); and *Starcher v. Byrne*, 687 So.2d 737 (Miss. 1997) (physician had duty to exercise ordinary care in treatment of patient).

asserted by service persons from its grant of jurisdiction, as was recognized by this Court the first time it was called upon to decide a case arising under the FTCA:

> The statute's terms are clear. They provide for District Court jurisdiction over any claim founded on negligence brought against the United States. **We are not persuaded that "any claim" means "any claim but that of servicemen."**

Brooks v. United States, 337 U.S. 49, 51 (1949) (emphasis added).[3] The fact that the Petitioner Ratcliff herein was a member of the armed forces, therefore, did not deprive the District Court of jurisdiction to hear his claims. Similarly, as will be shown below, the fact that the negligent governmental employee was also a member of the armed services does not render the FTCA inapplicable.

The fact that the allegedly negligent "employee[s] of the Government" herein were, like the Petitioner Ratcliff, members of the armed services, does not deprive the District Court of jurisdiction, because the FTCA specifically includes members of the military within its definition of those "employee[s] of the Government" upon whose negligent conduct FTCA liability may be premised:

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[3] Although the language of the FTCA was later changed, such that the specific words "any claim" no longer appear in the statute, this Court has held that the "change in language [effected] no substantive change in the law." See *Feres v. United States*, 340 U.S. 135, 140 n. 9.

"'Employee of the government' includes...members of the military or naval forces of the United States...." 28 U.S.C. § 2671. This Court has explicitly agreed with this conclusion: "The Act...does contemplate that the Government will sometimes [be required to] respond for negligence of military personnel...." *Feres*, 340 U.S. at p. 138. The plain and express language of the FTCA, therefore, provided the District Court with jurisdiction to hear the Petitioner Ratcliff's claims, despite the fact that the Petitioner Ratcliff, as well as the Respondent United States's allegedly negligent employees, were members of the armed services, which conclusion is also supported, as will be discussed below, by the fact that the FTCA, in its enumeration of those claims for which FTCA compensation may not be sought, did not include claims for injuries that are sustained "incident to service".

The FTCA, in recognition of the unique character of military service, provides that the United States may not be held liable for "claims arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war." 28 U.S.C. § 2680(j). Significantly absent from the list of exceptions set forth in 28 U.S.C. § 2680, therefore, is any exception for injuries sustained by service persons that are "incident to service". Thus, as has been concluded by legal commentators, the plain language of the FTCA provides that the District Court did have jurisdiction to hear the Petitioner Ratcliff's claim that he was injured by the negligence of a physician employed by the Respondent United States, even if those injuries were sustained "incident to service":

Reading these [statutory] provisions, one

> might infer that the FTCA was intended to apply to injuries [sustained] incident to military service where such injuries were the result of negligence on the part of military personnel, if the injuries were noncombatant....

Seidelson, "From *Feres v. United States* to *Boyle v. United Technologies Corp.*,: An Examination of Supreme Court Jurisprudence and a Couple of Suggestions," 32 Duquesne L.Rev. 219, 221-21 (1994). See also Hornbrook & Kirschbaum, "The Feres Doctrine: Here Today – Gone Tomorrow?", 33 The Air Force L.Rev. 1, 2 (1990) ("Conspicuously, the FTCA contains no specific peacetime exclusion for military personnel[, and, s]imilarly, it fails to mention the phrase 'incident to service'"). Justice Scalia, in his dissent *United States v. Johnson*, 481 U.S. 681, 693 (1986), reached the same conclusion:

> Read as it is written, this language [in 28 U.S.C. §1346(b)] renders the United States liable to *all* persons, including servicemen, injured by the negligence of Government employees. Other provisions of the [FTCA] set forth a number of exceptions, but none generally precludes FTCA suits brought by servicemen. One, in fact, excludes "[a]ny claim arising out of the *combatant activities* of the military or naval forces, the Coast Guard, *during times of war*," §2680(j) (emphasis added), demonstrating that Congress specifically considered, and provided what it thought needful for, the

> special requirements of the military. There was no proper basis for us to supplement to -- i.e., revise -- that congressional disposition [by also excluding claims by service persons that are "incident to service"]. [Emphasis in original.]

Justice Scalia concluded, therefore, that "*Feres* was wrongly decided and heartily deserves the 'widespread, almost universal criticism' it has received." *Johnson*, 481 U.S. at p. 700 (quoting *In re "Agent Orange" Product Liability Litigation*, 580 F. Supp. 1242, 1246 (EDNY), appeal dism'd, 745 F.2d 161 (1984) [extensive citations of other authorities criticizing *Feres* omitted].

It is respectfully submitted that this Court should allow the writ sought herein and overrule its holding in *Feres*. Even if this Court has no desire to overrule *Feres*, however, the writ should nonetheless be allowed to resolve conflict among the United States Circuit Courts of Appeals regarding the proper interpretation of the phrase "incident to service," which conflict flows from the fact that this Court's jurisprudence in this area is confusing and contradictory.

C. This Court's Jurisprudence In This Area Is Confusing And Contradictory, Which Has Lead To Conflicting Decisions In The United States Circuit Courts Of Appeals Regarding When An Injury Is Sustained "Incident To Service"

Feres was not the first time that this Court addressed the issue whether a service person could bring a

claim under the FTCA -- in *Brooks v. United States*, 337 U.S. 49, 50 (1949), a serviceman, while on furlough, was struck by a United States Army truck operated by a civilian employee of the Army, and this Court, based upon the plain language of the FTCA, held that the injury was compensable. This Court also examined the statutory exceptions set forth in 28 U.S.C. § 2680, and indicated that the failure of Congress to exclude claims by servicemen, other than claims based upon injuries sustained in combat or in foreign countries, showed that such claims were intended by Congress to be covered by the FTCA, and indicated that to believe otherwise would be "absurd."

> The statute does contain twelve exceptions. [Citation omitted.] None exclude petitioner's claims. One is for claims arising in a foreign country. A second excludes claims arising out of combatant activities... during times of war. [S]uch exceptions make it clear that Congress knew what it was about when it used the term "any claim." [Further, i]t would be absurd to believe that Congress did not have servicemen in mind in 1946 when this statute [i.e., the FTCA] was passed. The overseas and combatant activities exceptions make this plain.

Id., at p. 51.

This Court also examined the legislative history, and noted that, prior to the enactment of the FTCA, there "were eighteen tort claims bills introduced in Congress

between 1925 and 1935 [,and that a]ll but two [of these bills] contained exceptions denying recovery to members of the armed forces [, but that w]hen the present Tort Claims Act was...introduced...the exception concerning servicemen had been dropped." Id., at pp. 51-52. This legislative history, therefore, was deemed to support the conclusion that claims by members of the armed forces, subject to the specific exceptions set forth in 28 U.S.C. § 2680, were intended to be covered by the FTCA.

It is important to note that this Court also held that the recovery of other statutory benefits by the injured service person did not constitute the exclusive remedy available to him, because the statutes providing for such benefits did not indicate any intent to preclude FTCA claims, although any such benefits would act as an offset from any liability the government would have under the FTCA:

> Provisions in other statutes for disability payments to servicemen...indicate no purpose to forbid tort actions under the Tort Claims Act.... [T]here is nothing in the Tort Claims Act or the veterans' laws which provides for exclusiveness of remedy.... We will not call either remedy...exclusive nor pronounce a doctrine of election of remedies, when Congress has not done so....
>
> But this does not mean that the amount payable under servicemen's benefit laws should not be deducted, or taken into consideration, when the serviceman obtains

judgment under the Tort Claims Act.

Id., at p. 53.

Finally, this Court rejected the argument that, simply because the claimant was in the military, "dire consequences" would flow from allowing a claim to be made, because the facts in that case implicated no military issues:

> [The injury] had nothing to do with [his] Army career, [and the] injuries [were] not caused by their service **except in the sense that all human events depend upon what has already transpired**.

Id. at p. 52 (emphasis added). This Court, therefore, expressly rejected the argument that the mere fact that an injury can be traced back, in some sense, to the fact that the claimant was in the armed services, was insufficient to bar the claim.

The next relevant case decided by this Court, *Feres*, presented three separate cases, two of which presented the issue whether recovery could be had under the FTCA by servicemen who allegedly sustained injury and/or death as a result of medical negligence by Army physicians -- the third case presented a serviceman's claim that he was injured as the result of a faulty heating plant which serviced Army barracks -- and this Court held that all three claims were noncompensable, on the ground that the injuries were sustained "incident to service". In reaching this conclusion, this Court first held that the fact that Congress failed to

provide for any coordination of other statutory benefits to which a serviceman would be entitled with any damages recoverable under the FTCA showed that Congress did **not** intend to allow a serviceman to recover both statutory benefits and FTCA damages:

> This Court, in declining claims for wrongs incident to service under the Tort Claims Act, cannot escape attributing some bearing upon it to enactments by Congress which provide systems of simple, certain, and uniform compensation for injuries or death of those in armed services. . . . If Congress had contemplated that this Tort Act would be held to apply in cases of this kind, it is difficult to see why it should have omitted any provision to adjust these two types of remedy to each other. The absence of any such adjustment is persuasive that there was no awareness that the Act might be interpreted to permit recovery for injuries incident to military service.

Feres, 340 U.S. at p. 144. The problem with this justification, i.e., that the receipt of other statutory benefits defeats a claim under the FTCA is, of course, that it had just been, as shown above, explicitly rejected by this Court in *Brooks*, *supra*.

Subsequently, in *United States v. Brown*, 348 U.S. 110, 111-12 (1954) (emphasis added), a veteran alleged that he received substandard medical care of a service-related injury, i.e., an injury which, **unlike** the Petitioner Ratcliff's

kidney stones, **was** sustained in the course and scope of the performance of military duties, at a VA hospital, and this Court allowed the claim to proceed even though the veteran had received statutory benefits:

> The *Brooks* case held that servicemen were covered by the Tort Claims Act where the injury was not incident to or caused by their military service.... **The fact that compensation was sought and paid under the Veteran's Act was held not to bar recovery under the Tort Claims Act....**

In *Brown*, therefore, this Court concluded that the injury complained of was not sustained "incident to service", even though other statutory benefits had been recovered, even though the condition being treated was service related, and even though the plaintiff's entitlement to the medical treatment flowed from his or her status as a service person:

> [Plaintiff] was there [i.e., was in the hospital and received the medical treatment,] of course, because he had been in the service and because he had received an injury in the service.... We adhere to the line drawn in the *Feres* case between injuries that did and did not arise out of or in the course of military duty. Since the negligent act giving rise to the injury [,i.e., negligent medical treatment,] in the present case was not incident to military service, the *Brooks* case [,and not the *Feres* case,] governs....

Brown, 348 U.S. at pp. 112-113. The majority in *Brown*, therefore, rejected the following argument of Justice Black, in his dissent, to the effect that the fact that the plaintiff was entitled to the medical treatment he received as a result of his membership in the armed services is sufficient, in and of itself, to establish that any injury resultant from negligence in the rendition of that medical treatment was sustained "incident to service":

> In this case...the injury is inseparably related to military service and the *Brooks* case should not be held controlling. But for his army service this veteran could not have been injured in the veterans hospital as he was eligible and admitted for treatment there solely because of war service which gave him veteran status. Moreover, he was actually being treated for an army service injury.

Brown, 348 U.S. at p. 114 (Justice Black dissenting).

This Court, in recognition of the fact that its decision in *Brown* conflicted with *Feres*, offered the following alternative "military discipline" justification for its holding in *Feres*:

> [T]he Tort Claims Act does not cover "injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." [Citing *Feres*.] The peculiar and special relationship of the solider to his superiors, the effects of the

> maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given or negligent acts committed in the course of military duty, led the Court [in Feres] to read that Act as excluding claims of that character.

Brown, 348 U.S. at p. 112. Pursuant to the holding in *Brown*, the determination whether a claim by a service person is covered by the FTCA, i.e., whether the injury upon which the claim is based was sustained "incident to service," seemed straightforward -- it depended upon whether the claim somehow implicated issues of "military discipline." In fact, this "military discipline" rationale for the result in *Feres*, first articulated in *Brown*, was subsequently posited by this Court, in *United States v. Shearer*, 473 U.S. 52, 57 (1984), as the sole criteria and justification for the *Feres* doctrine:

> "'[I]n the last analysis *Feres* seems best explained by the peculiar and special relationship of the solider to his superiors, the effects of discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders given on negligent acts committed in the course of military duty.'" *United States v. Muniz*, 374 U.S. 150, 162 (1963), quoting *United States v. Brown*, 348 U.S. 110, 112 (1954).

This Court then concluded as follows:

> The *Feres* doctrine cannot be reduced to a few bright-line rules; each case must be examined in light of *Feres* and subsequent cases. Here the Court of Appeals placed great weight on the fact that [the serviceman] was off duty and away from the base when he was [injured]. **But the situs of the [injury] is not nearly as important as whether the suit requires the civilian court to second-guess military decisions [citations omitted], and whether the suit might impair essential military discipline [citation omitted].**

Shearer, 473 U.S. at p. 57 (emphasis added). This Court, therefore, held that the "other factors in *Feres*" were "no longer controlling." Id., at p. 58 n. 4.[4]

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[4] This Court, in *Feres*, offered three justifications for the "incident to service" exception. First, the fact that other disability benefits had been received, which factor, as shown above, is not dispositive. Second, the "federal" nature of the relationship between the Government and service persons. Although these two factors were relegated to the status of "no longer controlling" in *Shearer*, and were replaced with the military discipline justification, they were then resurrected, at least to some extent, as will be discussed below, by this Court in *United States v. Johnson*, 481 U.S. 681 (1986). A third factor relied upon by this Court in *Feres* was that, because a private person could not raise an army, the FTCA, which only allowed the government to be held liable under circumstances where a

Had the decision in *Shearer* been this Court's last word, it may have served to settle this area of law by providing that the FTCA covers claims by service persons unless the resolution of that claim would somehow implicate issues of military discipline, in which case the claim of the Petitioner herein would be covered, because it cannot be seriously contended that allowing a suit for medical negligence will somehow disrupt military discipline:

> Because of its importance to our national security, deterioration of military discipline is a major concern.... On one end of the spectrum, *Feres* can be rationalized because permitting soldiers to make claims against battlefield commanders for "negligently" employing "unsound" tactics could create hesitant commanders and argumentative soldiers. **On the other end of the spectrum, *Feres* may be difficult to**

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private person would be liable, could not apply to claims by servicemen. This factor, however, has been soundly rejected, and was not resurrected in *Johnson*. See e.g., *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), and *Rainier v. United States*, 352 U.S. 315 (1957), which allowed recoveries under the FTCA despite the fact that the injury producing activity was not of the sort in which private persons also engaged, i.e., the operation of a Coast Guard lighthouse, and fire fighting. See also, *United States v. Muniz*, 374 U.S. 150 (1963).

explain because it may not be clear how discipline will deteriorate if tank drivers are permitted to recover for medical malpractice occurring while they are unconscious in the operating room.

Hornbrook & Kirschbaum, "The Feres Doctrine: Here Today, Gone Tomorrow?" 33 Air Force L.Rev. 1, 9-10 (emphasis added). See also Comment, "Military Medical Malpractice and the *Feres* Doctrine," 20 Georgia L.Rev. 497, 520 (1986), ("[w]hile it is possible to foresee the problems that might occur if officers were held liable for negligent orders given during combat, it seems highly unlikely that medical malpractice claims would jeopardize military discipline...."); and Comment, "Providing New Relief to the Victims of Military Medicine: A New Challenge to the Application of the *Feres* Doctrine in Military Medical Malpractice Cases," 32 Duquesne L.Rev. 109,. 126 (1993) ("The military discipline rationale loses its credence as it applies to medical malpractice"). Unfortunately, however, this Court's subsequent decision in *United States v. Johnson*, 481 U.S. 681 (1986), by rejecting military discipline as the sole criteria for determining whether a claim is covered by the FTCA, injected confusion and uncertainty into the law, which has lead the United States Circuit Courts of Appeals to employ conflicting standards for determining whether an injury was sustained "incident to service."

In *Johnson*, which is this Court's most recent decision concerning the viability of a service person's claim under the FTCA, this Court held that intrusion into military discipline was not the only reason to apply the

Feres "incident to service" doctrine, and indicated that the lower courts were also to consider the two other factors set forth in *Feres*, i.e., the receipt of other statutory benefits and the federal nature of the relationship. First, this Court noted that the nature of the relationship between the Government and members of the military service is "distinctively federal in character." *Johnson*, 481 U.S. at p. 689. Although this factor is somewhat ambiguous, and had been previously relegated, in *Shearer*, to the status of "no longer controlling," this Court indicated that this "federal relationship is implicated to the greatest degree when a service member is performing [military] activities incident to his federal service":

> Where a service member is injured **incident to service – that is, *because of* his *military* relationship with the government** – it "makes no sense to [allow recovery under the FTCA]. Instead, application of the underlying federal [statutory benefits] remedy that provides "simple, certain, and uniform compensation for injuries or death of those in the armed services."

Johnson, 481 at p. 689 (emphasis added). Thus, in this Court's most recent pronouncement, it defined the "federal relationship" component of the *Feres* doctrine as relating to the "[p]erformance of the military function in diverse parts of the country," because "[p]erformance of the military function…entails a '[s]ignificant risk of accidents and injuries.'" *Johnson*, 481 U.S. at p. 689 (emphasis added). The "federal relationship" component of the *Feres* doctrine, therefore, although characterized by this Court as

constituting a factor separate from the issue of military discipline, is implicated only when the service person's claim involves "military" activities, thereby creating confusion regarding whether it is, in fact, a separate and distinct consideration.

This Court, in *Johnson*, also referred to the fact that the service person in that case had received other statutory benefits. It is important to remember, however, as demonstrated above, that this Court has previously, and repeatedly, held that the mere receipt of other statutory benefits does not, in and of itself, establish that a claim is not within the reach of the FTCA.

The third, and final, factor referred to in *Johnson*, 481 U.S. at p. 690, was the military discipline justification set forth in *Shearer*:

> Third, *Feres*, and its progeny indicates that suits brought by service members against the Government for injuries incurred incident to service are barred by the *Feres* doctrine because they are the "type[s] of claims that, if generally permitted, would involve the judiciary in sensitive military affairs at the expense of military discipline and effectiveness."

As will be shown below, as a result of the confusion regarding just what factors should be considered in determining whether an injury was sustained "incident to service," the United States Circuit Courts of Appeals have reached conflicting decisions, which conflict needs to be

resolved by this Court.

As noted in the opinion of the Court below, Sixth Circuit law provides that the "incident to service" exception is not limited to military activities, and therefore includes, for example, injuries sustained from the negligent medical care of non-service related medical conditions:

> This rule of law is now called the *Feres* doctrine. **The term "incident to service" is not limited to military training and combat,** but rather encompasses "all injuries suffered by military personnel that are even remotely related to an individual's status as a member of the military." *Major v. United States*, 835 F.2d 641, 644-45 (6th Cir. 1987).
>
> Under the law of this [circuit], the medical treatment received by Ratcliff is included in the term "incident to service."

Appendix A (emphasis added). Thus, in the Sixth Circuit, a "bright-line rule" exists -- "We have held numerous times that the *Feres* doctrine bars medical malpractice claims . . . regardless of the source of the original illness or injury" (Appendix A) -- despite the fact that this Court has held that the "*Feres* doctrine cannot be reduced to a few bright-line rules. . . ." *Shearer*, 437 U.S. at p. 57.[5]

---

[5] This failure to appropriately limit *Feres* to conduct that can be fairly described as "military" in nature has led the Sixth Circuit to reach absurd conclusions, such as the

In *Dreier v. United States*, 106 F.3d 844, 850 (9th Cir. 1997) (quoting *Johnson v. United States*, 704 F.2d 1431 (8th Cir. 1983), on the other hand, the Court of Appeals for the Ninth Circuit held that *Feres* has no application when there is no relationship between the manner in which the injury was sustained and military interests:

> Where...there is "no relevant relationship between the service member's behavior, and the military interests that might be jeopardized by civil suits, the *Feres* doctrine cannot bar recovery."

---

conclusion, in *Irwin v. United States*, 845 F.2d 126 (6th Cir. 1988), that the prenatal care of a pregnant service woman was somehow "incident to service," and the conclusion, in *Sidley v. United States*, 861 F.2d 988 (6th Cir. 1988), that the negligent treatment of a broken leg sustained in a motorcycle accident was "incident to service." Such results are well-founded only if it can be concluded that the mere fact that the service person was provided the medical treatment because he or she was a member of the armed services is sufficient to mandate the conclusion that any injuries resultant from negligence in the rendition of that medical care are, therefore, "incident to service." As shown above, however, this Court, in *Brooks*, held that the mere fact that the treatment complained of was received because the person was in the service does not, ipso facto, mandate the conclusion that any injury resultant from that treatment is, therefore, "incident to service."

Thus, Ninth Circuit law provides that the "key inquiry in determining whether an injury was suffered 'incident to service' is 'whether the suit requires the civilian court to second-guess military decisions, . . . and whether the suit might impair essential military discipline.'" *Dreier*, at p. 852 (quoting *Shearer*, 473 U.S. at p. 57 (1985)). The court held that these principles of law were "not undermined by *United States v. Johnson*, 481 U.S. 681 . . . ." *Dreier*, 106 F.3d at p. 854.

The Second Circuit, in *Taber v. Maine*, 67 F.3d 1029 (2d Cir. 1995), in a valiant and convincing effort to explain and harmonize the decisions of this Court with regard to the proper resolution of the issue whether a service person's claim against the United States is or is not allowed by the FTCA, has set forth yet another standard, which flows from that court's recognition that the statutory benefits available to a service person are best viewed as comprising the following two different kinds of benefits -- benefits analogous to state workers' compensation benefits, which cover only injuries sustained in the course and scope of the employment, and benefits analogous to employer provided private health and disability insurance, which cover injuries which were not sustained in the course and scope of the employment. Once this distinction is recognized, this Court's jurisprudence, which, as shown above, is in conflict regarding the significance of the fact that the service person received other benefits, can be harmonized – the receipt of benefits akin to workers' compensation benefits will preclude an FTCA claim, while the receipt of benefits akin to private health and disability insurance will not:

> There is a fundamental difference between the government's compensation scheme for its military "employees" and workers' compensation laws. The government's compensation scheme is not limited to compensating military "employees' who are injured in ways that "arise out of or in the scope of employment." It covers servicemembers' injuries, as well as diseases, that are completely unrelated to a military enterprise.... Workers' compensation laws [on the other hand] only compensate employees for injuries that rise out of or in the course of their employment. And under these laws, it is only this limited class of injuries that give rise to a *Feres*-like prohibition of suits by employees against their employers.

Taber, 67 F.3d at p. 1044. In this regard, the Court noted that it is well-established that, although the receipt of state workers' compensation benefits will preclude an employee from bringing a civil action against his or her employer, the receipt of benefits under employer provided private health insurance will not. *Taber*, 67 F.3d at p. 1045. This distinction satisfactorily harmonizes the different outcomes in *Brooks* and *Feres*:

> *Brooks* and *Feres* make the same distinction. *Feres* bars suits where compensation is given under a military analogue to workers' compensation. *Brooks*

> allows suits when compensation occurs for non-work related injuries, i.e., those that would not be covered by workers' compensation. Read this way, *Brooks, Feres*, and their respective progeny are not only substantially consistent with each other, but they also achieve a rough parity with workers' compensation laws[and] accomplish the very result that the Court sought in *Feres*.

Taber, 67 F.3d at p. 1045.

Moreover, this test obviates the need to examine, as a separate factor, whether the maintenance of the suit will interfere with considerations of military discipline, because, if it will, then the injury must have been incurred "incident to service":

> In other words, *Feres*' bar on claims "aris[ing] out of or in the course of activity incident to service," 340 U.S. at 146, 71 S.Ct. at 159, understood in the light of its workers' compensation rationale, will almost inevitably keep the judiciary out of matters of military discipline.

Taber, 67 F.3d at p. 1046. With regard to the issue of military discipline vis-à-vis the tortfeasor-government employee, *Taber*, 67 F.2d at p. 1047, noted that the *Feres* doctrine ***only*** applies when the claimant, not the tortfeasor, is a service person, such that a private individual is not precluded from bringing a claim under the FTCA

regardless whether the tortfeasor-government employee's misconduct somehow implicates issues of military discipline, such that, logically, precluding claims by service persons cannot be justified on that basis.

The court in *Taber*, however, in recognition of what has been described as this Court's "almost mystical regard for military discipline" (see Hornbrook & Kirschbaum, "The Feres Doctrine: Here Today -- Gone Tomorrow?", 33 Air Force L.Rev. 1, 9), left open the possibility that a claim may be barred under the FTCA on the basis of military discipline vis-à-vis the tortfeasor-government employee, although the court found it difficult to envision when such action would be necessary. See *Taber*, 67 F.3d at p. 1048 ("[s]till, there [may be] some very rare cases in which military discipline is crucial.").

In sum, this Court's precedent in this area of law, which is conflicting and confusing, can be simplified and harmonized by following *Taber*, which held that when the service person's injuries would be covered by the equivalent of state workers' compensation, rather than employer-provided health or disability insurance, i.e., when the injury is sustained in the course and scope of the service person's employment, *Feres* will apply and bar the claim – otherwise, the claim may be made:

> Because *Feres* bars a claim for injuries that "arise out of or in the course of activity incident to service," *Feres*, 340 U.S. at 146, 71 S.Ct. at 159, we conclude that in assessing whether a military plaintiff's FTCA claim is barred, the court should

> proceed by considering the same question that would determine whether the plaintiff would be entitled to receive standard workers' compensation payments for his injury: was the plaintiff engaged in activities that fell within the scope of the plaintiff's military employment? Where the answer is "yes," so that the plaintiff would be entitled to receive standard workers' compensation payments, this will mean that the *Feres* doctrine applies, barring recovery under the FTCA. Conversely, if the answer is "no," so that the plaintiff would have no entitlement to recover standard workers' compensation payments, there should be no *Feres* bar, absent unusual circumstances that would call into play the *Feres* discipline rationale.

Taber, 67 F.3d at p. 1050.

CONCLUSION

For the foregoing reasons, Petitioner Ratcliff respectfully requests this Court to allow the writ sought herein and accept jurisdiction in this case to either overrule *Feres* or to resolve conflict in the Circuit Courts of Appeals regarding what standard is to be utilized in determining whether an injury was sustained "incident to service".

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NOT RECOMMENDED FOR PUBLICATION

No. 98-3745

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THOMAS J. RATCLIFF,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	ON APPEAL FROM THE
	)	UNITED STATES UNITED
UNITED STATES OF AMERICA,	)	DISTRICT COURT FOR THE SOUTHERN
	)	DISTRICT OF OHIO
Defendant-Appellee,	)	

6th Circuit
Court of Appeals
Filed 7/22/99

Before: WELLFORD, SILER, and GILMAN, Circuite Judges.

PER CURIAM. Plaintiff Thoma J. Ratcliff filed this action under the Federal Tort Claims Act ("FTCA"). 28 U.S.C. §§ 1346(b) and 2671 *et seq*., claiming injury as a result of medical malpractice committed by the Departments of the Army and Air Force. Ratcliff appeals the district

court's dismissal of the action for lack of subject matter jurisdiction under the *Feres* doctrine. We affirm.

While Ratcliff was on active duty in the Army, he was seen in an Army hospital emergency room and diagnosed with kidney stones. he was transferred to an Air Force hospital for further treatment. Ratcliff claims that the negligence of the health care professionals employed by the United States at the two hospitals caused him permanent injury by damaging his lumbar and sacral nerves, thus confirning him to a wheelchair with some bowel and bladder dysfunction.

The sole issue presented by this case is whether to doctrine of *Feres v. United States*, 340 U.S. 135 (1950), bars Ratcliff's claim against the Untied States. We review *de novo* the dismissal of a complaint for lack of subject matter jurisdiction. *See Skees v. United States*, 107 F.3d 421, 422-23 (6th Cir. 1997).

We have held numerous times that the *Feres* doctrine bars medical malpractice claims against the United States under the FTCA, regardless of the source of the original illness or injury. *See Skees*, 107 F.3d at 424 (Discussing cases). The FTCA contains a general waiver of sovereign immunity for tort claims, but excepts those claims arising out of wartime combatant activities of the military forces. *See* 28 U.S.C. §§ 2674 & 2680(j). The armed

forces exception was broadened by the Supreme Court in *Feres*, where the Court held that "the Government is not liable under the Federal Tort Claims Act for injuries to servicemen where the injuries arise out of or are in the course of activity incident to service." *Feres*. 340 U.S. at 146. This rule of law is now called the *Feres* doctrine. The term "incident to service" is not limited to military training and combat, but rather encompasses "all injuries suffered by military personnel that are even remotely related to individual's status as a member of the military." *Major v. United States*. 835 F.2d 641, 644-45 (6th Cir. 1987).

Under the law of this court, the medical treatment received by Ratcliff is included in thhe term "incident to service." *See Skees*, 107 F.3d at 424-25; *Sidley v. United States*, 861 F.2d 988, 990 (6th Cir. 1988); *Irvin v. United States*, 845 F.2d 126, 129-30 (6th Cir. 1988). Although Ratcliff urges this court to examine *Feres* and its Supreme Court progeny to find that *Skees* and its predecessor cases misinterpret the FTCA and *Feres*, a panel of this court is in no position to do so. As stated by the district court, "[t]he result may seem harsh, but under binding Sixth Circuit precedent, defendant is entitled to dismissal of plaintiff's claims as a matter of law."

AFFIRMED.

98-3745

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THOMAS J. RATCLIFF,	)	
	)	
Plaintiff-	)	
Appellant,	)	
	)	
V.	)	**ORDER**
	)	
UNITED STATES OF	)	
AMERICA,	)	
	)	
Defendant-	)	
Appellee,	)	

6th Circuit
Court of Appeals
Filed 10/26/99

BEFORE: WELLFORD, SILER, and GILMAN, Circuit Judges.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered uponthe original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

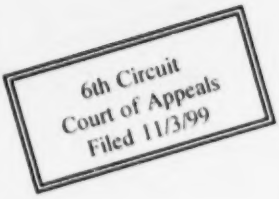
/s/ Leonard Green
Leonard Green, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
98-3745

Filed: November 3, 1999

THOMAS J. RATCLIFF

Plaintiff - Appellant



v.

UNITED STATES OF AMERICA

Defendant - Appelle

MANDATE

Pursuant to the court's disposition that was filed 7/22/99, the mandate for this case hereby issues today.

A True Copy.

No cost taxed
Filing Fee.....$
Printing.....$

Total.....$

Attest:

/s/ Debra Cook
Deputy Clerk

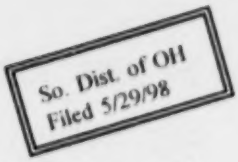
UNITED STATES DISTRICT COURT

Southern District of Ohio

Eastern Division

JUDGMENT IN A CIVIL CASE

THOMAS J. RATCLIFF,



Plaintiff,

vs **Case No.** C2-97-1341

UNITED STATES OF AMERICA, Judge Smith

Magistrate Judge King

Defendants,

[ ] Jury Verdict. This action came before the Court for a trial by jury . The issues have been tried and the jury has rendered its verdict.

[X] Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

[ ] Decision by Court. This action was decided by the Court without a trial or hearing.

IT IS ORDERED AND ADJUDGED that pursuant

to the Court's Opinion and Order filed May 29, 1998, FINAL JUDGMENT is hereby entered in this case, in favor of defendant, and against plaintiff, dismissing this action for lack of subject matter jurisdiction.

Date: May 29, 1998 KENNETH J. MURPHY, CLERK

/s/ G. Wellman
By /Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

Thomas J. Ratcliff,

Plaintiff,

V.

United States of America,

Defendant,

Case No. C-2-97-1341
JUDGE SMITH
Magistrate Judge King

OPINION AND ORDER

Plaintiff brings this action under the Federal Tort Claims Act, 28 U.S.C. §1346(b) and § 2671 *et seq.*, asserting that defendant is liable for damages plaintiff sustained as a result of allegedly negligent medical treatment at defendant's hospitals, Lyster Army Hospital in Alabama and Kessler Medical Center in Mississippi.

Defendant moves to dismiss for lack of subject matter jurisdiction. For the reasons that follow, the Court grants defendant's motion.

I.

Plaintiff was on active duty in the United States Army when he suffered from pain and blood in his urine. He was admitted on May 4, 1995 to Lyster Army Hospital and diagnosed with kidney stones which were surgically removed. Plaintiff alleges that this treatment was negligently performed.

After removal of the stones, plaintiff developed lower back spasms and numbness, and has since been unable to walk due to pain. Consequently, he was removed from active duty after a review of his condition by Medical Evaluation Board July 1, 1995 .

Plaintiff was placed on the Temporary Disability Retirement on January 26, 1996, and was permanently retired on June 10, 1997. Plaintiff filed administrative actions for relief with the Army and the Air Force, both of which were denied.

Plaintiff commenced this action on December 10,1997, alleging that he has and will sustain pain and suffering, mental anguish, and confinement to a wheelchair on March 19, 1998, defendant moved to dismiss this action for lack of subject matter jurisdiction.

II.

Defendant's motion to dismiss for lack of subject matter jurisdiction is based upon *Feres v. United States*, 340 U.S. 135 (1950) .In *Feres*, the Court held that the United States was not liable for injuries to servicemen under the Federal Tort Claims Act when those injuries were not incident to service

The Sixth Circuit Court of Appeals has indicated that injuries from medical treatment while on active duty.status are incident to service. For example, in *Irvin v. United States*, 8450 F. 2d. 126 (6th Cir.1988), the court held that negligence during the prenatal care of a servicewoman on active duty "arose out of or were in the course of activity incident to service." Id. at 130 .

Alleged psychiatric malpractice by a military hospital was also held to be barred by the *Feres* doctrine. *Skees v. United States*, 107 F.3d. 421 (6th Cir 1997). In *Skees*, the military hospital discharged a man after he was diagnosed by hospital staff to not be a threat to himself. he later committed suicide.

Plaintiff argues, however, that his injuries were not incident to service because they were sustained outside of his military activity. Plaintiff's mem. contra (Doc. 9) at 13. Plaintiff admits, however, that the Sixth Circuit has

indicated that *Feres* applies regardless of whether the conduct in question relates to military matters. Plaintiff's mem. contra (Doc. 9) at 12 n. 2. The *Feres* doctrine "extends beyond situations where the soldier is acting pursuant to orders or while subject to direct military command or discipline." *Sidley v. United States Dept. of the Navy*, 861 F.2d. 988, 990 (6th Cir. 1988). Specifically, the *Feres* doctrine applies to "alleged negligent medical treatment at a military hospital or medical facility." Id.

Plaintiff's injuries are the result of treatment he received in Defendant's military hospitals. Although, as in *Skees* and *Irvin*, the reason he was in the hospital was not related to military activity, it is nonetheless deemed as a matter of law to be incident to service under the *Feres* doctrine because he was on active duty status. The result may seem harsh, but under binding Sixth circuit precedent, defendant is entitled to dismissal of plaintiff's claims as a matter of law.

III.

For the above reasons, the Court **GRANTS** defendant's motion to dismiss (Doc. 7).

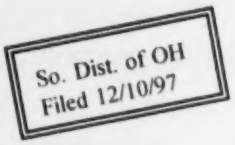
The Clerk shall enter a final judgment in this case, in favor of defendant, and against plaintiff, dismissing this action for lack of subject matter jurisdiction.

The Clerk shall remove this case from the Court's pending cases and motions lists.

IT IS SO ORDERED.

/s/ George C. Smith
GEORGE C. SMITH, JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

THOMAS J. RATCLIFF	:	
1966 Waterbrook Ln	:	
Columbus, OH 43209,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	**Civil Action No.**
	:	**C2 97-1341**
UNITED STATES	:	
OF AMERICA	:	**Judge Smith**
	:	**Magistrate Judge King**
Defendant,	:	

COMPLAINT

CLAIM FOR RELIEF OF PLAINTIFF AGAINST DEFENDANT

1. This action arises under Federal Tort Claims Act, 28 USC 1346(b), 2671 *et seq.*, as hereinafter more fully appears. Pursuant to 28 USC 2675(a), before this action was instituted, the claim set forth herein was presented to, and jointly denied by, the Defendant's agencies, the Department of the Air Force and the

Department of the Army, bycertified letter dated June 19, 1997. This suit was commenced within six months of the denial of said claim.

2. Plaintiff Thomas J. Ratcliff, a resident of the State of Ohio, resides at 1966 Waterbrook Lane, Columbus, Ohio, within the jurisdiction of this court. Venue is proper in this district pursuant to 28USC 1402(b).

3. Defendant, by and through its agencies, the Department of the Armyand the Department of the Air Force, owned, operated, managed and controlled, respectively, theLyster Army Hospital at Ft. Rucker, Alabama, and Keesler Medical Center at Keesler Air Force Base, Mississippi.

4. Defendant, through these agencies, and specifically at these hospitals, employed physicians, surgeons, nurses and other allied health care physicians to provide medical care and treatment to Defendant's militarymembers, including Plaintiff.

5. If Defendant were a private person, it would be liable to Plaintiff in accordance with the law of Mississippi and Alabama.

6. Service of process may be accomplished upon the United States of America by delivering by

certified mail, return receipt requested, a copy of Summons and Complaint to the United States Attorney for the Southern District of Ohio, Eatern Division, as follows:

Sharon J. Zealey
United States Attorney
280 North High Street
Columbus, Ohio 43215

Additionally, service may be accomplished upon the United States of America by delivering, by certified mail, return receipt requested, a copy of the Summons and Complaint to the Attorney General of the United States, as follows:

Janet Reno, United States
Attorney General
Office of the Attorney General
Room 511
Main Justice Building
Tenth & Constitution Avenue, N.W.
Washington, D.C. 20530

7. On or about May 4, 1995, Plaintiff was on active duty as a first lieutenant in the United States Army. Plaintiff, not incident to his service in the United States Army, was admitted to Lyster Army Hospital, Ft. Rucker, Alabama, and diagnosed with kidney stones. Plaintiff continued under the care of Defendant's physicians,

surgeons, nurses and other allied health care professionals at Lyster Army Hospital through May 10, 1995. The physicians,surgeons, nurses and other allied health care professionals at Lyster Army Hospital were amployees of the Defendant and were acting within the scope of their office or employment.

8. On May 10, 1995, Plaintiff was admitted to Keesler Medical Center, Keesler Air Force Base, Mississippi. Plaintiff continued under the care of the Defendant's physicians, surgeons, nurses and other allied health care professionals at Keesler medical Center through June 11, 1995. The Defendant's physicians, surgeons, nurses and other allied health care professionals at Keesler Medical Center were employees of the Defendant and were acting within the scope of their office or employment.

9. Defendant, through its employees acting within the scope of their office, employment and duties, were professionallynegligent and failed to meet the applicable standard of care of resonably careful and skillful physicians, surgeons, nurses and other allied health care professionals in that they failed to provide proper medical care and treatment to Plaintiff.

10. As a direct and proximate result of Defendant's negligence and failure to meet the applicable standard of care, Plaintiff sustained compartment syndrome

causing necrosis of the paraspinous muscles, and a secondary injury to L2-3 and 4 nerves and sacral nerves resulting in some bowel and bladder dysfunction. Plaintiff is now confined to a wheelchair. Plaintiff has suffered, and will continue to suffer, pain, mental anguish, permanent injury and has been denied a normal way of life.

11. As a further direct and proximate resultof the Defendant's negligence, Plaintiff has incurred medical and hospital expenses in and amount not yet determined and expects to continue to incur such medical and hospital expenses.

12. As a further direct and proximate result of the Defendant's negligence, Plaintiff has lost earnings in an amount not yet determined, and expects to lost future earnings, and has had his earning capacity permanently impaired.

13. As a result of Defendant's negligence, Plaintiff has been damaged in the amount of $25,000,000.00,

WHEREFORE, Plaintiff prays that Defendant be cited to appear and answer herein, and that upon final hearing, Plaintiff has judgment against the Defendant in the amount of $25,000,000.00 together with the cost of suit and

for such other and further relief to which Plaintiff may be justly entitled.

/s/ Robert G. Palmer
Robert G. Palmer (0022152)
Trial Attorney for Plaintiff
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Columbus, Ohio 43215
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(614) 221-6040 [fax]

Of Counsel:
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140 E. Town Street, Suite 1100
Columbus, Ohio 43215

Title 28
Judiciary and Judicial Procedure

Sec. 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:
(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;
(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

Sec. 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the

Federal Circuit shall be limited to the jurisdiction described in sections 1292 © and (d) and 1295 of this title.

Sec. 1346. United States as defendant

* * *

(b) (1) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January t, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrong act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred ....

Sec. 2671. Definitions

As used in this chapter and sections 1346(b) and 2401(b) of this title, the ten-n "Federal agency" includes the executive departments, the judicial and legislative branches, the military departments, independent establishments of the United States, and corporations primarily acting as instrumentalities or agencies of the United States, but does

not include any contractor with the United States.
"Employee of the government' includes officers or employees of any federal agency, members of the military or naval forces of the United States, members of the National Guard while engaged in training or duty under section 316, 502, 503, 504, or 505 of title 32, and persons acting on behalf of a federal agency in an official capacity, temporarily or permanently in the service of the United States, whether with or without compensation.

"Acting within the scope of his office or employment", in the case of a member of the military or naval forces of the United States or a member of the National Guard as defined in section 101(3) of title 32, means acting in line of duty.

Sec. 2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the

pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled. With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense which otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

Sec. 2680. Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to -

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a

discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods or merchandise by any officer of customs or excise or any other law-enforcement officer.

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Repealed. Sept. 26, 1950, ch. 1049, Sec. 13 (5), 64 Stat. 1043.)

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346(b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false

imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to execute searches, to seize evidence, or to make arrests for violations of Federal law.

(I) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(1) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.